Mega Meisa Sdn Bhd & Ors v Mustapah bin Dorani and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(NCVC)(W)-395–02 OF 2018 AND W-02(NCVC)(W)-472–03 OF 2018

HAMID SULTAN, HANIPAH FARIKULLAH AND KAMALUDIN MD SAID JJCA

22 JUNE 2020

Civil Procedure — Locus standi — Sale of land — Company bought land from its co-owners to carry out commercial development — Private caveat entered on land by one of the co-owners stated that balance of purchase price was receivable on their behalf by plaintiff as their representative/trustee — Contemporaneous with land sale agreement, plaintiff entered into joint venture agreement ('JVA') with company to develop the land — JVA provided that plaintiff was to be paid commission equivalent to the balance purchase price — Plaintiff sued company for total failure to perform JVA and sought court order setting aside transfer of land in company's name and requiring land to be transferred to him — Whether plaintiff had locus standi to sue the company for the aforesaid reliefs — Whether plaintiff entitled to reliefs claimed — Whether company's acquisition of the land was fraudulent — Whether company's title to the land defeasible

Six co-owners of a piece of land agreed under a sale and purchase agreement ('SPA') to sell the land to the first appellant ('MM') for residential development. The total purchase price for the land was RM3m divided into two portions. The first portion of RM500,000 was payable by MM to the landowners under the SPA in return for the land being transferred into its name. The balance RM2.5m was to be paid to the respondent — as representative and trustee of the land owners — under a joint venture agreement ('JVA') executed on the same day as the SPA between the respondent and MM for the development of 500 medium-cost apartments on the land. As added security, the second and third appellants signed letters of guarantee guaranteeing that the respondent would be paid the RM2.5m. Following the execution of the SPA, one of the land owners ('Rahmah') lodged a private caveat on the land describing the arrangements between the parties and stating that the balance purchase price of RM2.5m was to be paid by MM to the respondent as the representative and trustee of the land owners. After paying the RM500,000 to the landowners under the SPA and transferring the land to its name and subsequently paying RM354,000 to the respondent, MM failed to make any further payments under the JVA or to take any steps under the JVA towards development of the land. After the respondent's several demands to the appellants to pay him the balance RM2,146,000 (RM2.5m less RM354,000)

went unheeded, he sued them in the High Court for: (a) a declaration that all instruments relating to the transfer of the land to MM were null and void; (b) an order that the land be transferred to him and that the appellants pay him the balance RM2,146,000 as agreed under the JVA; and (c) general damages for breach of the JVA. The respondent alleged that MM had fraudulently acquired ownership of the land (which it later transferred to a third party) without having any real intention to develop it. The appellants denied the respondent's claims and, inter alia, asserted that his action was time-barred. After a full trial, the High Court granted the reliefs sought by the respondent. In the instant appeal against the trial court's decision, the appellants argued, among other things, that: (i) the respondent had no locus standi to commence the action (this ground was never raised in the trial court nor in the memorandum of appeal) and had no right or interest in the land to require it to be transferred to his name; (ii) the trial judge erred in finding the appellants guilty of fraud; and (iii) the JVA was illegal, null and void and unlawful for being contrary to public policy.

Held, unanimously dismissing the appeals and affirming the High Court's decision:

(1) In the documentation supporting her entry of private caveat on the land, one of the co-owners of the land, Rahmah bt Hj Abdul Wahid, had stated in Form 19B that MM had not paid the land owners the balance purchase price of RM2.5m and that the said sum was payable to the respondent as their representative and trustee to receive the said sum on their behalf. The respondent had pleaded that issue with precision. The SPA and the JVA had to be read together because they were executed contemporaneously and the JVA referred to matters stated in the SPA. The said documents showed that the original owners of the land had vested the respondent with the authority and power to deal with the land and to recover the balance purchase price from MM on their behalf. The respondent therefore had the locus standi to sue the appellants (see paras 33–40 & 68).

(2) The parties had intended under the JVA that MM should fulfill its fundamental obligation of submitting the layout plans for the development of the land to DBKL. This condition precedent was not fulfilled. The appellants' reason for not submitting the plans was that there were squatters on the land and there was no access road to the land. But they never pleaded this in their defence and only raised it for the first time during the trial. At all material times after the execution of the JVA, the appellants were fully capable of submitting the development plans to the authorities for approval but they failed, neglected and/or refused to do so (see paras 59–60 & 77–78).

(3) The appellants had committed fraud with intent to deceive and/or induce the respondent and the original owners of the land to enter into, respectively, the JVA and the SPA, without intending to fulfill the promises made under those agreements. Fraud was also evident in the appellants' failure to pay the balance purchase price and in willfully concealing the fact that MM had received RM1,594,984.32 it from the government following its compulsory acquisition of a portion of the land. The title to the land which MM had acquired as a result of the fraud was therefore defeasible (see paras 81, 87 & 115).

(4) Section 6(1) of the Limitation Act 1953 ('the LA') had no application in the instant case and the trial judge's failure to address that point was not a non-direction that amounted to a misdirection warranting appellate intervention. This was because since the court found that the appellants were guilty of fraud, the applicable period of limitation was what was prescribed under s 22 of the LA and not s 6(1) (see paras 98–100).

(5) The trial judge was correct in not addressing the issue that the JVA was illegal and unenforceable since that issue was never pleaded in the defence nor raised during the trial. It was raised for the first time in the appellants' written submissions before the trial court. Since the issue concerning illegality was a radical departure from the appellants' pleaded case, it ought to be disregarded (see paras 101–105).

(6) There was no basis for the appellants to contend that the JVA was unlawful for being opposed to public policy pursuant to s 24(e) of the Contracts Act 1950. Nothing in the JVA contained anything that was prima facie illegal. The appellants failed to prove that the respondent was involved in any illegal conduct (see paras 108–109 & 114).

[Bahasa Malaysia summary

Enam pemilik bersama sebidang tanah bersetuju melalui perjanjian jual beli ('SPA') untuk menjual tanah tersebut kepada perayu pertama ('MM') untuk memajukan rumah kediaman. Jumlah harga pembelian tanah tersebut adalah RM3 juta yang dibahagikan kepada dua bahagian. Bahagian pertama sebanyak RM500,000 dibayar oleh MM kepada pemilik tanah di bawah SPA dengan balasan tanah tersebut dipindahmilik kepada beliau. Baki RM2.5 juta akan dibayar kepada responden — sebagai wakil dan pemegang amanah pemilik tanah — di bawah perjanjian usaha sama ('JVA') yang ditandatangani pada hari yang sama dengan SPA antara responden dan MM untuk memajukan 500 pangsapuri kos sederhana di atas tanah tersebut. Sebagai jaminan tambahan, perayu kedua dan ketiga menandatangani surat jaminan yang menjamin bahawa responden akan dibayar sebanyak RM2.5 juta. Setelah SPA ditandatangani, salah seorang pemilik tanah ('Rahmah') memasukkan kaveat persendirian ke atas tanah tersebut yang menjelaskan perjanjian antara pihak-pihak dan menyatakan bahawa baki harga beliau sebanyak RM2.5 juta

A harus dibayar oleh MM kepada responden sebagai wakil dan pemegang amanah pemilik tanah tersebut. Setelah membayar RM500,000 kepada pemilik tanah di bawah SPA dan memindahmilik tanah tersebut kepada beliau dan kemudian membayar RM354,000 kepada responden, MM gagal membuat pembayaran selanjutnya di bawah JVA atau bertindak sebagaiman B JVA tersebut dalam memajukan tanah. Setelah beberapa tuntutan responden kepada perayu bagi membayar beliau baki sebanyak RM2,146,000 (RM2.5 juta kurang RM354,000) tidak diendahkan, beliau menyaman mereka di Mahkamah Tinggi untuk: (a) suatu pengisytiharan bahawa kesemua instrumen yang berkaitan dengan pindahmilik tanah kepada MM adalah tidak C sah dan terbatal; (b) suatu perintah agar tanah tersebut dipindahmilik kepadanya dan bahawa perayu membayar beliau baki sebanyak RM2,146,000 seperti yang dipersetujui di bawah JVA, dan (c) ganti rugi am kerana melanggar JVA. Responden mendakwa bahawa MM secara fraud telah memperoleh pemilikan tanah tersebut (yang kemudiannya dipindahmilik kepada pihak D ketiga) tanpa mempunyai niat untuk memajukannya. Perayu menafikan tuntutan responden dengan, antara lain, menegaskan bahawa tindakannya dihalang oleh had masa. Setelah perbicaraan penuh, Mahkamah Tinggi membenarkan relif yang dimohon oleh responden. Dalam rayuan semasa E terhadap keputusan mahkamah perbicaraan, perayu berpendapat, antara lain, bahawa: (i) responden tidak mempunyai locus standi untuk memulakan tindakan (alasan ini tidak pernah dibangkitkan di mahkamah perbicaraan atau dalam memorandum rayuan) dan tidak mempunyai hak atau kepentingan ke atas tanah tersebut untuk dipindahmilik kepada beliau; (ii) hakim perbicaraan F telah terkhilaf dalam dapatan bahawa perayu melakukan fraud; dan (iii) JVA itu tidak mengikut undang-undang, tidak sah dan terbatal kerana bertentangan kepentingan awam.

G **Diputuskan**, dengan sebulat suara menolak rayuan dan mengekalkan keputusan Mahkamah Tinggi:

(1) Melalui dokumentasi yang menyokong kemasukan kaveat persendirian ke tanah tersebut, salah seorang pemilik bersama tanah tersebut, Rahmah bt Hj Abdul Wahid, telah menyatakan dalam Borang 19B bahawa MM H belum membayar baki harga belian RM2.5 juta kepada pemilik tanah dan jumlah tersebut harus dibayar kepada responden sebagai wakil dan pemegang amanah mereka untuk menerima jumlah tersebut bagi pihak mereka. Responden telah memplidkan isu tersebut dengan tepat. SPA dan JVA harus dibaca bersama kerana ianya ditandatangani secara I serentak dan JVA merujuk kepada perkara-perkara yang dinyatakan dalam SPA. Dokumen tersebut menunjukkan bahawa pemilik asal tanah telah menyerahkan hak dan kuasa kepada responden untuk mengendalikan tanah tersebut dan mendapatkan semula baki harga belian dari MM bagi pihak mereka. Oleh itu, responden mempunyai

lokus standi untuk menyaman pihak perayu (lihat perenggan 33–40 & 68).

(2) Pihak-pihak berniat di bawah JVA bahawa MM harus memenuhi tanggungjawabnya dalam menyerahkan pelan susun atur bagi memajukan tanah tersebut kepada DBKL. Syarat asas ini tidak dipenuhi. Alasan perayu untuk tidak mengemukakan pelan mereka adalah kerana terdapat penduduk setinggan di atas tanah tersebut dan tidak ada jalan masuk ke tanah tersebut. Tetapi mereka tidak pernah memplidkan fakta ini dalam pembelaan mereka dan hanya membangkitkannya untuk kai pertama semasa perbicaraan. Pada setiap masa yang material setelah pelaksanaan JVA, perayu sepenuhnya mampu menyerahkan pelan pemajuan kepada pihak berkuasa untuk persetujuan tetapi mereka gagal, ingkar dan/atau enggan untuk melakukannya (lihat perenggan 59–60 & 77–78).

(3) Perayu telah melakukan fraud dengan niat untuk menipu dan/atau mendorong responden dan pemilik tanah tersebut untuk masing-masing memasuki JVA dan SPA, tanpa berniat untuk memenuhi janji-janji yang dibuat berdasarkan perjanjian tersebut. Fraud juga terbukti dalam kegagalan perayu untuk membayar baki harga belian dan dengan sengaja menyembunyikan fakta bahawa MM telah menerima RM1,594,984.32 dari Kerajaan berikutan pengambilalihan sebahagian daripada tanah tersebut. Hak milik ke atas tanah yang telah diperolehi oleh MM melalui fraud oleh itu dapat disangkal (lihat perenggan 81, 87 & 115).

(4) Seksyen 6(1) Akta Had Masa 1953 ('AHM') tidak boleh diguna pakai dalam kes semasa dan kegagalan hakim perbicaraan untuk membuat dapatan bukanlah sesuatu kekhilafan yang membawa kepada salah arah yang memerlukan campur tangan mahkamah rayuan. Oleh kerana mahkamah telah mendapati bahawa perayu bersalah melakukan fraud, tempoh had masa yang seharusnya diguna pakai adalah seperti yang ditetapkan di bawah s 22 LA dan bukannya s 6(1) (lihat perenggan 98–100).

(5) Hakim perbicaraan telah tepat dalam tidak membuat dapatan terhadap isu bahawa JVA tidak sah dan tidak dapat dilaksanakan kerana isu tersebut tidak pernah diplidkan dalam pembelaan atau dibangkitkan sepanjang perbicaraan. Ianya dibangkitkan untuk pertama kalinya dalam hujahan bertulis perayu di hadapan mahkamah perbicaraan. Oleh kerana isu mengenai pelanggaran undang-undang adalah tersimpang dari kes yang diplidkan oleh perayu, maka hal tersebut harus diabaikan (lihat perenggan 101–105).

(6) Tidak ada asas bagi perayu untuk berpendapat bahawa JVA tidak sah kerana bertentangan dengan kepentingan awam menurut s 24(e) Akta Kontrak 1950. Tidak ada apa-apa perkara di dalam JVA yang

A mengandungi sesuatu yang dianggap prima facie tidak sah. Perayu gagal membuktikan bahawa responden terlibat dalam sebarang tindakan yang menyalahi undang-undang (lihat perenggan 108–109 & 114).]

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C *Asia Television Ltd & Anor v Viwa Video Sdn Bhd & connected cases* [1984] 2 MLJ 304, FC (refd)
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Banbury v Bank of Montreal [1918] AC 626, HL (refd)
D *Butler v Fairclough* [1917] 23 CLR 78, HC (refd)
Chase Perdana Bhd v Md Afendi bin Hamdan [2009] 6 MLJ 783; [2009] 6 CLJ 501, FC (refd)
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F *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2010] 9 CLJ 785, FC (refd)
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Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428, SC (refd)
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Lin Wen-chih & Anor v Mycom Bhd [2014] 3 MLJ 691, CA (refd)
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240; [1983] 2 CLJ 70, FC (refd)
Loke Yew v Port Swettenham Rubber Co Ltd [1913] AC 491, PC (refd)
Low Huat Cheng & Anor v Rozdenil bin Toni and another appeal [2016] 5 MLJ 141, FC (refd)
Majlis Bandaraya Pulau Pinang v Mohd Noor Sirajajudeen & Anor [2018] 5 MLJ 349, CA (refd)
MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd [2016] 2 MLJ 428; [2016] 4 CLJ 665, CA (refd)
OSK & Partners Sdn Bhd & Anor v Assets Investment Pte Ltd & Anor [2008] 4 MLJ 914, CA (refd)
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Legislation referred to

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Copyright Act 1987
Evidence Act 1950 ss 91, 92
Films (Censorship) Act 2002
Limitation Act 1953 ss 6, 6(1), (1)(a), 22
National Land Code ss 89, 323, 340, 340(1), (2), (2)(a), Form 19B
Valuers, Appraisers and Estate Agents Act 1981 ss 21(1)(aa), (1)(c), 22(1)(aa), (1)(ba), (1)(c), (1)(d)

Appeal from: Civil Suit No WA-22NCVC-84–02 of 2016 (High Court, Kuala Lumpur)

Aston Philip Paiva (Furqan Aree with him) (Azmi & Assoc) for the appellants. M Manoharan (Lily Chua with him) (M Manoharan & Co) for the respondent.

Hanipah Farikullah JCA:

INTRODUCTION

[1] These appeals arose from a judgment of the High Court at Kuala Lumpur, which allowed the plaintiff's claim after a full trial.

[2] The plaintiff has commenced proceedings against the defendants in the High Court for breach of the joint venture agreement ('JVA') dated 21 October 1993. The plaintiff also claimed for breach of letter of guarantee by the second and third defendants and fraud by all the defendants.

[3] The defendants denied the plaintiff's claim and pleaded that the plaintiff's claim was barred by limitation.

[4] At the High Court, the plaintiff sought for the following reliefs against the defendants:

(a) a declaration that all instruments relating to the transfer of property to the first defendant to be null and void and all parts of the land to be transferred to the plaintiff;

(b) general damages in lieu of the specific performance of the joint venture agreement; and

(c) alternatively, the defendants to pay to the plaintiff the sum of RM2,146,000.

[5] The learned High Court judge found that the registration of title in the name of the first defendant was obtained by fraud and made the following orders on 26 February 2018:

(a) a declaration that all instruments of transfer relating to the said land is null and void;

(b) the first defendant to transfer the said land to the plaintiff, and that the first defendant shall execute the relevant instruments to effect transfer within 14 days of the order; and

(c) the sum of RM2,146,000 be paid to the plaintiff.

[6] Aggrieved by the decision of the High Court, the first and the third defendants filed these appeals.

[7] The first defendant is now the registered proprietor of the said land. A

The background facts

[8] In order to understand the orders made by the learned High Court judge and the issues that arise, it is convenient to turn to the factual and contractual background. The registered proprietors (undivided shares) of a piece of land held under Geran Mukim No 139, Lot 2105, Mukim of Setapak, Wilayah Persekutuan (the said land) entered into a sales and purchase agreement with the first defendant. B C

[9] The registered proprietors of the undivided shares of the said Land are as follow:

(a) Rahmah bt Hj Abdul Wahid;

(b) Mariam bt Hj Abdul Wahid; D

(c) Aishah bt Hj Abdul Wahid;

(d) Fatimah bt Hj Abdul Wahid;

(e) Hasnah bt Hj Abdul Wahid; and E

(f) Isah bin Buyong (the original owners).

[10] It is undisputed that the sale and purchase agreement was not signed by the plaintiff. The plaintiff claimed that he knew Rahmah through an acquaintance who has since passed away. It is the plaintiff's evidence that in 1993, the first defendant informed him that he is attracted to purchase the said land due to its potential development. F

[11] The plaintiff claimed that the defendants offered to buy over the said land for RM500,000 and the additional of RM2.5m to be paid from the development profit pursuant to a joint venture and to set off the RM2.5m with units of apartment of equivalent value. The second and third defendants also offered to give a personal guarantee to that effect. G

[12] As a result of the discussion between parties, the land owners agreed to the offer and gave the plaintiff a full mandate to execute the joint venture project. H

[13] From the discussion, parties then on 21 October 1993 executed a sale and purchase agreement with consideration of RM500,000 (between the original land owners and the first defendant) (SPA) and a joint venture agreement for the payment of RM2.5m (between the plaintiff and the first defendant) (JVA) both dated 21 October 1993. I

Sales and purchase agreement

[14] The salient terms and conditions of the SPA are as follows:

(a) the purchase price is RM500,000;

(b) the mode of payment of the purchase price are as follows:

(i) deposit: Ringgit forty-four thousand and five hundred (RM44,500) upon signing of the agreement;

(ii) further part payment: Ringgit five thousand five hundred (RM5,500) upon memorandum of transfer duly executed and the original issue document of title being delivered to Messrs Malek-Chong & Leonard;

(iii) the balance purchase price:

1. a sum of Ringgit Two Hundred Thousand (RM200,000) upon:

(A) transferring of 164/265 undivided shares into the Purchaser's name;

(B) withdrawal of private caveat lodged by RAJA HARON BIN RAJA A AZIZ (NRIC NO 0693227) under Bil Perserahan No 360/91 *Jld 29 Folio* 15 for which a sum of RM10,000 from this portion of money shall be used for the payment of the WITHDRAWAL OF PRIVATE CAVEAt;

(C) commencement for the application of letter of administration of the deceased, FATIMAH BTE HJ ABDUL WAHID and for commencement of the application for transmission of property pursuant to the approval of the letter of administration, whichever is applicable.

Clause 3.1:

The Vendor shall simultaneously upon execution of this Agreement execute:

(a) a Memorandum of Transfer of the said Property in escrow and deposit the same with MESSRS MALEK CHONG & LEONARD, Advocates & Solicitors of Suite 16.22-16.23, 16th Floor, Pertama Complex, Jalan Tuanku Abdul Rahman, 50100 Kuala Lumpur (hereinafter called 'the Solicitors') for adjudication of stamp duty purposes and upon the said Solicitors' undertaking to hold the same as Stakeholders pending the completion of the sale;

(b) an Irrevocable Power of Attorney of the said Property in favour of the Purchaser and/or his nominee(s) and deposit the same with the said Solicitors.

Clause 3.2:

Notwithstanding that the balance purchase price has not been fully settled the respective parties agree that the transfer be adjudicated and stamped and registered in the purchaser's name or its nominee (s).

Clause 3.3 — Vacant Possession

Vacant possession of the said Property shall be delivered to the Purchaser upon execution of this Agreement.

[15] On the facts, there is no evidence in the present case that the defendants had paid the balance price by the completion date. The evidence shows that the defendant paid the deposit of RM500,000 and RM354,000 respectively.

Joint venture agreement

[16] As we have stated earlier, it is not disputed that the plaintiff entered into a joint venture agreement with the first defendant on the same date as the sales and purchase agreement ('the JV').

[17] The recital of the JV agreement states that the plaintiff shall at the request and on behalf of the first defendant secure the sale of the said land.

[18] The relevant terms and conditions of the JV agreement are as follows:

(a) the first defendant at his own costs and expenses must secure the approval from Dewan Bandaraya Kuala Lumpur (DBKL) of a development plan of the said property for the construction of a minimum of 500 units of standard medium cost apartment, each counting of an approximate area of 900 sqft or less and at a purchase price of RM70,000 or more per unit;

(b) the first defendant at his own costs and expenses must use his endeavors to secure the safe approval from DBKL within a period of six month from the date of submission of a layout plan of the said Property to DBKL by the second party.

It is hereby agreed that the second party shall be responsible to all approved and requisite contribution/s for the above application/s.

(c) in the event of any delay in the approval from DBKL within the period of six month from the date of submission of a layout plan of the said property to DBKL, the second party has the absolute discretion to extend and/or terminate this agreement by giving the first party one month notice in writing and at the end of the notice period, this agreement shall be terminated;

(d) upon conditions A and B hereinbefore fulfilled, the second party undertake to pay a commission in the amount of RM2.5m within a

period of 60 days or upon the obtaining of a loan facilities from the bank by the second party, whichever is earlier;

(e) the payment of commission in the sum of RM2.5m is under the personal guarantee of the following persons hereinbelow mentioned:

(i) Yusoff Shah bin Husain Shah (NRIC No 4870176); and

(ii) Abd Halim bin Mahmud (NRIC No 5220271).

A copy of the letter of guarantee is annexed herewith and marked 'M-2'.

(f) this guarantee shall in all respect and for all purposes be binding and operative until full payment is made to the first party by the second party.

Letter of guarantee

[19] By a letter of guarantee (undated but executed simultaneously with the joint venture agreement) ('the guarantee'), one Yusoff Shah bin Husain Shah ('Yusoff Shah') and (directors of the defendant) jointly and severally undertook and guaranteed payment of the sum of RM2.5m under the joint venture agreement to the respondent. Yusoff Shah passed away several years ago, and did not participate in the trial.

Exchange of letters

[20] In the proceedings before us, it is also relevant to consider the following letters which were then exchanged between the parties:

(a) a letter dated 10 March 1997 from the defendant to the respondent, soon after which the defendant paid the sum of RM354,000 to the respondent as an upfront payment 'dengan sikap bertolak ansur dan baik budibicara';

(b) a letter dated 31 March 1997 by which the plaintiff (through his solicitors) demanded payment of the sum of RM2,146,000 (being RM2.5m less the payment of RM354,000) from the defendant pursuant to the joint venture agreement;

(c) a letter dated 30 April 1997 by which the plaintiff (through his solicitors) demanded payment of the sum of RM2,146,000 from Yusoff Shah and pursuant to the guarantee;

(d) a letter dated 12 May 1997 marked 'Tanpa Prasangka' from the defendant to the plaintiff by which the first defendant agreed to settle the sum of RM2,146,000, subject to the following:

(i) the respondent to withdraw all legal proceedings in whatever form against the defendant; A

(ii) the defendant to be given vacant possession of the land; and

(iii) the respondent 'bersedia dengan rela hati untuk memberi sokongan dan khidmat yang diperlukan oleh Mega Meisa Sdn Bhd sekiranya diperlukan'. B

At Tthe High Court

[21] In gist, the plaintiff alleged that the title to the said land is defeasible by reason of fraud and breach of the JV agreement by the defendants. C

[22] At the High Court, the issues to be tried as agreed between the parties are as follows: D

1. Sama ada Defendan Pertama telah gagal, abai dan/atau cuai untuk mematuhi syarat-syarat perjanjian usahasama tersebut dan Defendan Pertama telah memungkiri terma-terma yang dinyatakan dalam Perjanjian Usahasama bertarikh 21 October 1993 tersebut?

2. Sama ada Defendan Pertama mempunyai obligasi untuk membentangkan cadangan pelan susunan atur kepada pihak berkuasa dalam perjanjian usahasama tersebut? E

3. Sama ada Defendan-Defendan telah melakukan fraud terhadap Plaintif Pertama dan pemilik-pemilik tanah tersebut sepertimana yang telah diplidkan? F

4. Sama ada Defendan Kedua dan Defendan Ketiga gagal melaksanakan akujanji yang diberikan dalam Surat Jaminan tersebut?

5. Sama ada Defendan-Defendan adalah diestop untuk bergantung kepada isu kegagalan Plaintif Pertama berikutan pengakuan liability terhadap bayaran tunggakan oleh Defendan-Defendan melalui surat bertarikh 12 May 1997? G

6. Sama ada Defendan Pertama telah memperoleh pengkayaan tak patut ('unjustly enriched') berikutan tindakan tidak berpatutan ('unconscionable conduct') dan kelakuan frod yang dipraktikkan terhadap Plaintif Pertama dan pemilik-pemilik asal tanah tersebut? H

7. Sama ada Plaintif Pertama berhak kepada tuntutan untuk penghakiman berjumlah RM2,146,000.00 bersama gantirugi am, faedah dan kos yang dipohon? I

8. Sama ada Defendan Pertama pernah membentangkan dan/atau menyerahkan pelan susunatur kepada Plaintif Pertama ataupun kepada pihak-pihak berkenaan bagi mendapatkan kelulusan daripada Dewan Bandaraya Kuala Lumpur?

A
9. Sama ada Defendan Pertama pernah menamatkan Perjanjian Usahasama bertarikh 21 October 1993 tersebut?

10. Sama ada Plaintif Pertama telah gagal, abai dan/atau cuai untuk mematuhi syarat-syarat Perjanjian Usahasama tersebut dan Plaintif Pertama telah memungkiri terma-terma yang dinyatakan di dalam Perjanjian Usahasama tersebut?
B

11. Sama ada Plaintif Pertama mempunya obligasi untuk mendapatkan pembeli bagi Hartanah tersebut?

12. Sama ada Perjanjian Usahasama tersebut telah ditamatkan?
C

13. Sama ada Plaintif Pertama berhak untuk menuntut relif-relif di dalam perenggan 49 Penyata Tuntutan?

14. Sama ada Plaintif Pertama mempunyai sebarang asas untuk meneruskan tindakan ini terhadap Defendan-Defendan?
D

15. Sama ada tindakan Plaintif Pertama dihalang oleh had masa?

[23] The learned High Court judge made the following findings which can be summarised as follows:

E
(a) the first defendant offered to purchase the said land from the original proprietors at a consideration of RM3m, RM500,000 was to be paid as deposit and balance of RM2.5m to be paid from the sale proceeds of parties proposed development comprising 500 medium cost apartments;
F

(b) in consideration of the first defendant's request for the plaintiff to seek the sale of the said land from the original proprietors, the first defendant had agreed to pay plaintiff the sum of RM2.5m. The second and third defendants executed a letter of guarantee to guarantee the first defendant's payment of the sum of RM2.5m to the plaintiff. The third defendant had earlier approached the plaintiff for the joint venture development of the said land;
G

(c) the JV agreement which parties have executed was not completed due to the defendant's failure to perform its contractual obligation and failure to fulfill the terms of the condition precedent. The defendant failed to prepare and submit the required layout of the development project to Dewan Bandaraya Kuala Lumpur (DBKL); and
H

I
(d) the defendants have defrauded the respondent and the landowners in failing to pay the respondent the balance consideration under the SPA for the sum of RM2.5m and willful concealment from the respondent receipt of RM1,594,984.32 as compensation payment pursuant to the government's acquisition of a portion of the said land.

[24] The learned High Court judge found that the registration of title in the name of the first defendant was obtained by fraud and made the following orders:

(a) a declaration that all instruments of transfer relating to the said land is null and void;

(b) an order that the said land be transferred to the plaintiff, and that the first defendant shall execute the relevant instruments to effect transfer within 14 days of the order; and

(c) the sum of RM2,146,000 be paid to the plaintiff.

THE APPEAL

[25] By this appeal, the defendants seek to set aside the declaration and orders made by the learned judge. The defendants have appealed against the decision of the learned High Court judge on the following grounds as stated in the memorandum of appeal:

1. In light of the consideration that the second plaintiff in the High Court was struck off as a party to the suit, the High Court erred in law when it declared all instruments of transfer with respect to the land held under Lot No 29343, Geran Mukim No.2023 (Lot No 2105, Geran Mukim No 139), Mukim Setapak, Daerah Wilayah Persekutuan ('the said Land') null and void.

2. In light of the consideration that the said Land has been transferred to a third party before the date of the judgment, the High Court erred in law when ordered for a transfer of the said Land from the first appellant ('the first defendant') to the respondent ('the plaintiff').

3. In light of the documentary evidence before it, the High Court erred in law when it made findings of fact based on parol evidence or no evidence, as indicated in paragraphs 2.2, 5.1, 5.2, 5.3, 5.4, 5.5, 5.13 and 5.14 of the (High Court) Grounds of Judgment.

4. In light of the uncontroverted correspondence and/or notices dated 10-3-1997, 31-3-1997, 30-4-1997, 12-5-1997,17-6-1997 and 7-7-1997, the High Court erred in law when it failed to find:-

a) That the plaintiff acknowledged that the first defendant had purportedly breached the Joint-Venture Agreement between the plaintiff and the first defendant dated 21-10-1993 ('the Contract') on or around 10-3-1997 or 12-5-1997; and

b) That the plaintiff sought to rescind the Contract, and did so, through service of a notice under section 218 of the Companies Act 1965 on the first defendant on or around 17-6-1997, and made a demand to the third appellant ('the third defendant') with respect to the letter of guarantee dated 21-10-1993 ('the guarantee') on 30-4-1997; and

c) That the plaintiff filed this action on 12-2-2016, beyond the limitation period stipulated under section 6(1)(a) of the Limitation Act 1953; or

d) In the alternative, the plaintiff failed to perform his legal obligations as agreed by him and shown in the letter dated 12-5-1997; and

e) That, accordingly, the first defendant was not in breach of the Contract.

1. Based on aforesaid matters and in light of the uncontroverted evidence before it, the High Court erred in law when it failed to find:-

a) That the plaintiff action as against the first defendant and third defendant are both barred by section 6(1)(a) of the Limitation Act 1953, and thus the said action is frivolous or vexatious or an abuse of process; or

b) That the Contract is void ie it is unlawful given its object being:

i) Forbidden by sections 21(1)(aa) or (c) or 22C(1)(aa), (ba), (c) or (d) of the Valuers, Appraisers and Estate Agents Act 1981, being, an undertaking of an 'estate agency practice' or the carrying out of the 'property management' by an unregistered estate agent or valuer respectively, pursuant to section 24(a) of the Contract Acts 1950; or

ii) Opposed to public policy ie it envisages the sale of influence or 'influence peddling' in relation to the sale and development of a Malay Reserve land, pursuant to section 24(e) of the Contracts Act 1950; and

c) That, for the above reason(s), the guarantee dated 21-10-1993 is equally void.

2. In light of the above matters, the High Court did not act within its jurisdiction given its failure to hear and dispose off the issues raised by the defendants in their defence and written submission particularly their defence of limitation and the illegality of the Contract.

ISSUES

[26] In challenging the decision made by the learned High Court judge, the defendants advanced five principal arguments:

(a) the plaintiff has no locus standi to commence this action;

(b) the learned High Court judge erred in law and facts in concluding that there was fraud by the defendant;

(c) the High Court judge erred in law when she relied on parole evidence based on her findings in paras 2.2, 5.1, 5.2, 5.3, 5.4, 5.13, 5.14 of the judgment.

(d) the JV agreement is illegal as it is in breach of ss 21(1)(aa) or (c) or 22(1)(aa), (ba), (c) or (d) of the Valuers, Appraisers and Estate Agents Act 1981; and

(e) the JV agreement is unlawful as it is against public policy.

[27] In our opinion, the issues are to be resolved on the basis of the evidence and the proper construction of the SPA and the JV agreement, against the background of the statutory provisions, namely the National Land Code ('the NLC') as far as they are relevant.

Locus standi of the plaintiff

[28] The initial issue for determination in this appeal relates to the capacity of the plaintiff to institute the proceedings.

[29] The issue of locus standi of the plaintiff to commence this proceeding was neither raised in the High Court or the memorandum of appeal. A party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party after the case has been decided against him, to raise a new argument which whether deliberately or by his advertence, he failed to put during the hearing which he had an opportunity to raise (see: *Government of the State of Sabah v Syarikat Raspand (suing as a firm)* [2010] 5 MLJ 717; *Banbury v Bank of Montreal* [1918] AC 626)

[30] It was submitted for the defendants that the plaintiff did not have the standing to bring this action as the plaintiff has not shown any right or interest affected with respect to the said land, while the original proprietors/vendors have made no claim against the first defendant with respect to the SPA. Thus, it was submitted for the defendant that both the declaration and the order to transfer the said land to the plaintiff would have no basis in fact or law. It was on this basis that the defendants challenged the decision of the learned High Court judge.

[31] In support of its submission, the learned counsel relied on the judgment of the Supreme Court in *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177. In that case, the pivotal point raised for determination relates to the capacity of the respondent to institute and maintain the proceedings instituted by him. The respondent and 183 other persons applied in May 1972 for State land in Sekakap, Mersing in the State of Johore but with no response for some eight years. It then came to his knowledge that some time in 1976, land in that area had been alienated to more than 100 people, the majority of whom are not residents in Mersing, including the appellant who was at all material times the Menteri Besar of the State of Johore and personages in the upper echelon of the administration such as member of the State Executive Council and Ministers. The respondent on December 23, 1980 instituted the proceedings seeking the declaration impugning the validity of the alienation of land in Mersing to the appellant and named as respondents thereto to the State Director of Lands and Mines and the Government of the

State of Johore in addition to the appellant. The appellant applied on 17 March 1981 to have the proceedings instituted struck out primarily on a challenge to the respondent's standing to sue and also on certain procedural objections. The appellant's application was dismissed in the High Court on 20 September 1980. On appeal, this court found that the respondent had locus standi to institute and maintain the proceedings and accordingly dismissed the appeal.

[32] Delivering the judgment of the Supreme Court in *Tan Sri Haji Othman Saat* Abdoolcader J held as follow:

> The sensible approach in the matter of locus standi in injunctions and declarations would be that as a matter of jurisdiction, an assertion of an infringement of a contractual or a proprietary rights, the commission of a tort, a statutory right or the breach of a statute which affects the plaintiff's interests substantially or where the plaintiff has come genuine interest in having his legal position declared, even though he could get no other relief, should suffice. When it comes however to the question of discretion on a consideration of the substantive application, it may well be proper in particular cases to refuse a remedy to persons who, though they may have standing as a matter of jurisdiction on the lines we have indicated, do not merit it, perhaps because, inter alia, others are more directly affected, or the plaintiff himself is fundamentally not.

[33] On the contrary, the plaintiff relied on the benefits of para 2(1) and 2(4) of the caveat that he had locus standi to commence this action.

[34] The documentary evidence shows that on 24 April 2015, Rahmah bt Hj Abdul Wahid lodged a private caveat on the said land, to preserve her legal rights and the rights of the other original proprietors on the said land pursuant to the SPA.

[35] The interest of the original proprietor as reflected in Form 19B (s 323) are as follows:

> (2) Alasan-alasan tuntutan saya/kami ke atas tanah/kepentingan itu ialah:
>
> 1. Pada 21hb Oktober 1993, satu Joint-Venture Agreement telah dibuat di antara HAJI MUSTAPAH BIN DORANI (KP: 400513-06-5057) dengan MEGA MEISA SDN. BHD. untuk menjual tanah tersebut kepada MEGA MEISA SDN. BHD. dengan baki wang RM2.5 juta daripada perjanjian jual beli oleh MEGA MEISA SDN. BHD. dan tuan-tuan tanah termasuk saya yang ada mempunyai Bahagian di dalam tanah tersebut seluas (6a. 2r. 20p) akan dibayar kepada HAJI MUSTAPAH BIN DORANI (KP: 400513-06-5057) sebagai wakil kepada semua tuan-tuan tanah tersebut termasuk saya seperti mengikut di dalam catatan nama-nama di dalam Geran Mukim 139, Lot 2105, Mukim Setapak, Wilayah Persekutuan, Daerah Kuala Lumpur. Namun sehingga kini, saya masih belum menerima bayaran penuh daripada pihak Tuan Punya Tanah Berdaftar.

2. Pada 21hb Oktober 1993, satu surat telah diberikan kepada HAJI MUSTAPAH BIN DORANI untuk menerima wang baki jualan sebanyak RM2.5 juga itu yang mana jumlah harga asal ialah RM3 juta sahaja. HAJI MUSTAPAH BIN DORANI telah diberikan oleh syarikat MEGA MEISA SDN. BHD. satu perjanjian yang dinamakan Joint-Venture Agreement di antara HAJI MUSTAPAH DORANI dan syarikat tersebut untuk menggantikan nama-nama pemilik asal bagi sementara dan juga satu surat LETTER OF GUARANTEE telah pun diberi kepada HAJI MUSTAPAH BIN DORANI oleh syarikat tersebut.

3. Dan juga pada 12hb Mei 1997, satu lagi surat akuan diberi kepada HAJI MUSTAPAH BIN DORANI untuk memberitahu HAJI MUSTAPAH BIN DORANI yang syarikat tersebut akan melunaskan jumlah tunggakan sebanyak RM2,146,000.00 (Ringgit Malaysia Dua Juta Satu Ratus Empat Puluh Enam Ribu Sahaja).

4. HAJI MUSTAPAH BIN DORANI dengan penuh kepercayaan kepada syarikat MEGA MEISA SDN. BHD. akan menunaikan segala janjinya kepada HAJI MUSTAPAH BIN DORANI membayar segala wang yang bakinya dibayar kepada HAJI MUSTAPAH BIN DORANI sebagai pemegang amanah untuk menerima wang tersebut bagi pihak saya dan saudara mara saya yang namanya tertera ddi dalam Geran tersebut.

5. Dengan ini saya lampirkan segala surat-surat serta perjanjian- perjanjian yang telah diberi kepada HAJI MUSTAPAH BIN DORANI oleh syarikat MEGA MEISA SDN. BHD. sebagai bukti.

6. Oleh itu, untuk menjamin kepentingan saya, saya memasukkan kaveat persendirian ini.

7. Maka dengan ini dimasukkan Kaveat Persendirian ke atas Harta yan diperihalkan di dalam jadual di bawah ini.'

[36] Coming back to this present case, it is observed that Rahmah had made a representation in Form 19B that the first defendant has not paid the balance purchase price. In our view, a person who has an equitable right or interest upon the said land may protect it by lodging a caveat which operates as notice to the whole world that the registered proprietors' title is subject to the equitable interest alleged in the caveat. The caveator claims an interest in the said land pursuant to the two agreements namely the SPA and JV agreement. It must be noted that the caveat filed by Rahmah was not set aside by the defendants.

[37] Pursuant to para 2(1) of the caveat, the plaintiff has been appointed as the representative of the original proprietors in respect of the said land.

[38] More fundamentally, however is the fact that pursuant to para 2(4) of the caveat, the plaintiff has been entrusted to receive the balance purchase price

on behalf of the original owners and that the plaintiff was also appointed as trustee to receive the balance payment of RM2.4m on behalf of the original proprietor of the said land.

[39] We have perused the entire statement of claim filed by the plaintiff and found that the issue in question was pleaded by the plaintiff with distinctive and precision (see *Instantcolor System Sdn Bhd v Inkmaker Asia Pacific Sdn Bhd* [2017] 2 MLJ 697). In the result, by reason of him being appointed as the representative of the original proprietors and having an entitlement to receive the balance purchase price, the plaintiff had an equitable interest in the said land. That equitable interest was adequately described in the caveat lodged by the original proprietors.

[40] It appears from the contemporaneous document that the original proprietors have vested the plaintiffs with the apparent authority and power to deal with the land and to recover the balance purchase price on behalf of the original proprietors. It follows the plaintiff has locus standi to sue. In the present case, we are of the view that pursuant to the caveat, the original proprietors enabled the plaintiff to represent themselves as the trustee of the said land.

FRAUD AND PAROLE EVIDENCE

[41] The substantial question in this appeal is whether the learned High Court judge has erred in fact and law when she made a finding of fraud by the defendants and therefore the interest of the first defendant having become the registered proprietor of the said land is defeasible.

[42] Learned counsel for the defendant submitted that the learned High Court judge erred in law and in facts when ruling on allegations of fraud by all the defendants for the following reasons:

(a) the express terms of the respective contracts made with free consent; that the SPA envisages a sale of the said land by the vendor to the company for RM500,000;

(b) pursuant to the SPA, the vendor has been paid the sum of RM500,000 and has made no claim against the company; and

(c) the company's letter dated 12 May 1997 and signed by the plaintiff; that the sum of RM2,146,000 will only be paid by the company after the plaintiff, among other things, delivers vacant possession of the said land. This was agreed to by the procurer and was specifically pleaded in para 19 of the defendants' defence.

[43] Further, it was contended by the defendant despite the oral and

documentary evidence, the High Court relied on parole evidence of the plaintiff to make the findings it did in paras 2.2, 5.1, 5.3, 5.4, 5.5, 5.13 and 5.14 of the grounds of judgment. Learned counsel for the defendant argued that such parole evidence relied by the learned High Court judge to 'add' to the SPA and the JV agreement, is inadmissible by virtue of ss 91 and 92 of the Evidence Act 1950.

[44] The propositions advanced by the defendants in relation to both of these issues also involve around the question of whether the SPA and the JV agreement are distinct and separate. We will deal with these issues in more detail in the later part of this judgment.

[45] Learned counsel for the plaintiff on the other hand argued that the interest in the said land alleged to have been vested in the first defendant was by way of the void instrument and therefore is defeasible and ought to be set aside.

[46] Section 340 of the NLC is important in the circumstances of the case. It is clear from the provisions, that the basic concept is that a person who acquires land under the Torrens System, bona fide and for valuable consideration is the owner of the land.

[47] Having registered its interest in the said land under the NLC, did the first defendant acquire a title which is indefeasible in the sense that it is no longer open to attack by the plaintiff. The question may be further refined by asking having regards to s 340 of the NLC, was there fraud on the part of the defendant. Unless there was such fraud, the first defendant holds it free of any interest.

[48] The certificate of title issued to the first defendant is conclusive evidence that the first defendant has a good and valid title to the land (see s 89 of the NLC). Section 340 complements this provision by providing that the registered proprietor holds the land absolutely free from all registered interest except:

> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible:
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

[49] The authorities concerning the indefeasibility of title and its exceptions have been laid out in the judgment of Azhar, FCJ in *Low Huat Cheng & Anor v Rozdenil bin Toni and another appeal* [2016] 5 MLJ 141 Azahar Mohamed, FCJ cited with an agreement the case of *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1:

> [34] Zaki Tun Azmi CJ in that case summarised the effect of concept of indefeasibility of title under s 340 of the NLC in the following terms:
>
> (4) I would like to look at s 340 of the NLC in a more simplified manner.
>
> (5) Let us refer to the first owner of a piece of land as 'A' who then transfers the same piece of land to 'B' and which subsequently is transferred to 'C'.
>
> (6) As far as s 340(1) of the NLC is concerned, A's title to the land is totally indefeasible. In short, if A's name appears on the registration, no one can come and claim for that title. The law will not entertain it at all.
>
> (7) Now comes the next person, B, whose name appears in the register. If it can be shown that the title or interests obtained by B was obtained by fraud or misrepresentation by him or anyone else to which he was a party or privy then his claim to the title or interest can be defeated. (See s 340(2)(a) of the NLC). Otherwise B stands in the same position as A.
>
> (8) The situation where it is proved that the registration in B's name was obtained by forgery or by means of an insufficient or void instrument is the same (See s 340(2)(b) of the NLC). His title or interest to the land is liable to be set aside by the previous owner who has a good title. In this latter instance, there is no need to show that B was a party or privy to that forgery or to obtaining the title or interest by a void instrument.
>
> (9) The third instance where B's title or interest could be defeated is where it was unlawfully acquired through the exercise of any power or authority conferred by any law. Section 340(2)(c) of the NLC deals with one who was, for example, acting in his capacity as an agent to a power of attorney. Even if C is in the same position as B, sub-section (3) also does not give protection to C unless he can show that he had acquired the title or interest in good faith and for valuable consideration. Any title or interest gained by any person thereafter is also liable to be set aside unless it could be shown that he had acquired it in good faith and for valuable consideration. This is what is called deferred indefeasibility of title. If his title or interest is challenged on similar grounds, the burden of proving there was valuable consideration and good faith lies on him.
>
> [35] The principle established in *Tan Ying Hong v Tan Sian San & Ors* was adopted and applied by this court in *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768. That case illustrates the concept of deferred indefeasibility very well. It is important that we look at it a little more closely and consider the judgment in some detail.

[36] In *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors,* the deceased was the registered co-proprietor of a one-third undivided share in two lots of land. She died in Indonesia in 1941 without issue. Some 43 years later, the first respondent applied for and obtained an order to distribute the deceased's share in the two lots of land among himself and the first to fourth respondents. The first to fourth respondents transferred their share in the two lots of land to the fifth and sixth respondents in consideration for the sum of RM25,000 and RM16,000 respectively. The appellants, who were the nephew and nieces of the deceased, filed a suit against the defendants whereby they sought to set aside the title to the two lots acquired by the fifth and sixth respondents. The cause of action of the appellants against the first to fourth respondents was fraud in the distribution of the estate of the deceased. The appellants pleaded that the first to fourth respondents had acquired title to the two lots by fraud and misrepresentation, in that they falsely stated that they were the children or beneficiaries of the deceased when they applied for and obtained the order of distribution. As a result of this fraud, the appellants claimed that the fifth and sixth respondents had not acquired an indefeasible title to the two lots. The appellants also pleaded that the seventh respondent, which was the governmental authority that granted the order of distribution, was negligent when it vested the deceased's share in the two lots to the first to fourth respondents. The appellants obtained judgment in default against the first to fourth respondents, who did not defend the claim. However, the fifth and sixth respondents claimed that as bona fide purchasers of value, they had obtained an indefeasible title. Although the High Court held that the first to fourth respondents had no right to transfer title or interest in the lots to the fifth and sixth respondents, it went on to hold that the fifth and sixth respondents had yet acquired an indefeasible title or interest in the two lots, as they had not acquired their title or interest by fraud. The appellants appealed to the Court of Appeal.

[37] The Court of Appeal found fraud on the part of the first to fourth respondents but held that the fifth and sixth respondents, in absence of fraud on them, were protected by the proviso to s 340(3) of the NLC and had acquired an indefeasible title or interest. In allowing the appeal, the Federal Court noted that both the trial court and the Court of Appeal held that the fifth and sixth respondents were bona fide purchasers. However, both courts failed to inquire whether the fifth or sixth respondents were immediate or subsequent purchasers. Only a subsequent purchaser was entitled to raise the shield of indefeasibility. An immediate purchaser of a title tainted by any one of the vitiating elements acquired a title that was not indefeasible. Thus, even if the fifth and sixth respondents were bona fide purchasers, they could not by that fact alone have acquired a shield of indefeasibility unless they had been bona fide subsequent purchasers. In the present case, the first to fourth respondents, from whom the fifth and sixth respondents obtained title were not immediate purchasers but rather imposters of those entitled to the estate of the deceased. Therefore, when the fraudulent title of the first to fourth respondents was set aside by the default judgment, the defeasible title of the fifth and sixth respondents was also defeated. As immediate purchasers, the fifth and sixth respondents were not protected by the proviso to s 340(3) of the NLC.

[38] Jeffery Tan FCJ in delivering the judgment of the court said that the defeasible title of a bona fide immediate purchaser only becomes indefeasible when it is subsequently passed to a bona fide subsequent purchaser. We find it instructive to

quote the relevant passage from his judgment as follows:

> [43] In the instant case, both the trial court and the Court of Appeal held that the fifth and sixth respondents were bona fide purchasers. But unfortunately, both the trial court and the Court of Appeal failed to inquire whether the fifth and or sixth respondents were immediate or subsequent purchasers. Only a subsequent purchaser is entitled to raise the shield of indefeasibility. An immediate purchaser of a title tainted by any one of the vitiating elements acquires a title that is not indefeasible. It flows from *Tan Ying Hong* that the bona fides of an immediate purchaser is not a shield to defeasibility. The defeasible title of a bona fide immediate purchaser is still liable to be set aside. The defeasible title of a bona fide immediate purchaser only becomes indefeasible when it is subsequently passed to a bona fide subsequent purchaser. That the fifth and sixth respondents were bona fide purchasers could not by that fact alone give a shield of indefeasibility. The fifth and or sixth respondents only acquired an indefeasible title if they were bona fide subsequent purchasers. But for the fifth and sixth respondents to have been bona fide subsequent purchasers, there must have been an immediate purchaser in the first place. The first to fourth respondents, from whom the fifth and sixth respondents obtained title, were not immediate purchasers. Rather, they were imposters of those entitled to the estate of the deceased. They, like the fake Boonsom who impersonated the true Boonsom, had no title to pass to the fifth and sixth respondents. The fifth and sixth respondents, who were the immediate purchasers, acquired a title that was not indefeasible. But when the fraudulent title of the first to fourth respondents was set aside by the default judgment, the defeasible title of the fifth and sixth respondents was also defeated.
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> [39] At this juncture, it would be appropriate to provide a summary of the principle of deferred indefeasibility up to this point. It is now settled that s 340 of the NLC provides for the concept of deferred indefeasibility and that the defeasible title of a bona fide immediate purchaser becomes indefeasible when it is subsequently passed to a bona fide subsequent purchaser. Teo Keang Sood and Khaw Lake Tee in *Land Law in Malaysia, Cases and Commentary* (3rd Ed) at para 4.34 correctly state the law upon this subject matter: Deferred indefeasibility postpones the badge of immunity where registration was obtained by way of a forged or void or insufficient instrument until the title is registered in the name of a subsequent purchaser in good faith, whereupon indefeasibility will attach to the title or interest, as the case may be. Indefeasibility is deferred even where the registered proprietor or interest holder has not occasioned the defect in the instrument or was not party to the forgery.

[50] As the registered proprietor of the land, s 340(1) of the NLC confers on the person an indefeasibility of title in the land. Nonetheless, in the present case, the first defendant's title is liable to be set aside and shall not be indefeasible if it was a party or privy to the fraud. 'Fraud' within the meaning of s 340(2)(a) of the NLC means actual fraud and not constructive or equitable fraud on the part of the person whose title or interest is being impeached. This issue has been considered in a number of cases. That section was considered

heavily by Azhar FCJ in *Low Huat Cheng & Anor v Rozdenil bin Toni and another appeal*. There must be actual fraud to defeat a person of his title or interest. It must involve dishonesty of some sort — a willful and conscious disregard and violation of the rights of other persons, which was committed prior to or at the time of registration (see *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81; [1983] 1 CLJ 183 ; [1983] CLJ Rep 387, *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101). Fraud may be established if the designed object of a transaction is to cheat a man of a known existing right or where by a deliberate and dishonest act a person loses an existing right (see *Loi Hieng Chiong v Kon Tek Shin* [1983] 1 MLJ 31; [1983] CLJ Rep 240; [1983] 2 CLJ 70). Mere knowledge of the existence of an unregistered claim or interest in the land may not amount to fraud unless there is a deliberate and dishonest attempt to deprive the unregistered claimant of his claim or interest therein (see *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491). It is not enough to show that the transfer had the effect of depriving the plaintiff of a known existing right; it must be demonstrated that the transfer was executed with the intention of cheating the plaintiff of such right (see *Goh Hooi Yin v Lim Teong Ghee & Ors* [1990] 3 MLJ 23; [1990] 2 CLJ Rep 48; [1990] 2 CLJ 203). Fraud may occur where the designed object of a transfer is to cheat a person of an existing right or where by a deliberate and dishonest act a person is deprived of his existing right (see *Datuk Jagindar Singh & Ors v Tara Rajaratnam* [1983] 2 MLJ 196; [1983] 1 LNS 21 (FC)). The term 'fraud' in that provision also imports personal dishonesty or moral turpitude (see *Butler v Fairclough* [1917] 23 CLR 78). The standard of proof for fraud in civil proceedings is on the balance of probabilities (see *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584). Whether or not fraud exists is a question of fact to be decided on the facts and circumstances of each case.

[51] Section 17 of the Contracts Act 1950 define that 'Fraud' includes a promise made by a party to a contract, or with his connivance, or by his agent without any intention of performing it, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract.

[52] Therefore, the plaintiff's case falls to be decided by reference to the provisions of s 340(1) and (2) of the NLC.

[53] It not disputed that the original proprietors of the land transferred the said land to the first defendants on 9 March 1994. Clause 3.2 of the sale and purchase agreement provides that notwithstanding the balance purchase price has not been fully settled, the respective parties agreed that the transfer be adjudicated and stamped and registered in the purchaser's name or its nominee.

[54] At the time of filing this action, the land was registered in the name of the first defendant pursuant to the sale and purchase agreement. However, the defendants informed the learned High Court judge after the trial had been concluded that the first defendant had transferred the land to a third party.

[55] As we have stated earlier, the High Court found that the registered owner of the title in the name of the first defendant was obtained by fraud. The learned High Court judge said that the fraud was committed by relying on the following evidence:

> 5.13 In view of the first defendant's clear failure of its primary obligation under the JVA, the first defendant's averment of plaintiff's failure to remove squatters from the said land, was found by the Court to be a feasible and desperate attempt to evade the defendant's clear liability to pay plaintiff the balance RM2.5 million. Defendants clearly from their failure, have from the consent of the JVA intended to deceive plaintiff and, the owners of the land in enlisting the plaintiff's service to produce sale from the owners and, subsequently reneged on its obligation which resulted in the non-completion of the JVA.
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> 5.14 In simultaneously execute the three documents, the SPA, JVA and Letter of Guarantee, it is evident that defendants jointly have intended to deceive the plaintiff and, the land owners with the purchase of the land at a mere payment of RM500,000 as deposit.

[56] We pause here to draw attention to some evidence adduced by the plaintiff bearing upon the validity and/or effect of these transfers.

[57] It must be noted that cl 3.1(a) of the sale and purchase agreement required the vendor simultaneously upon the execution of the agreement to execute transfer of the said land in escrow and to deposit it with Messrs Malek-Chong & Leonard for adjudication of stamp duty eventhough the balance purchase price has not been settled. It is undisputed fact that the original proprietors transfer the said land to the defendant before the completion of the balance purchase price.

[58] Reading cl 3.1 and 3.2 of the sale and purchase agreement suggests that the said land was beneficially owned by the original proprietors until the balance purchase price was settled. It must be emphasised that no evidence was adduced by the defendant that the balance purchase price was settled by them.

[59] Based on the facts and circumstances of this case, it is clear that the applicants at all material time after the execution of the joint venture agreement is capable and was not prevented by any reason of law to submit the layout plan but yet have failed, refused and/or neglected to do so.

[60] The reason given by the applicants for non-submission is that there are squatters on the land and there is no access road to the land. This was never pleaded in their defence and only raised for the first time during the trial.

[61] Further, it was admitted during the cross-examination that DW1 could still submit the layout plan. It is observed that the question of whether the DBKL will approve or reject the layout submission is merely speculative and a separate matter altogether.

WHETHER THE SALE AND PURCHASE AGREEMENT AND THE JV AGREEMENT ARE DISTINCT AND SEVERABLE/FRAUD

[62] The submissions of the defendant on the issue of fraud also assert that the learned High Court judge erred the reasons of the learned High Court judge as stated in para 41 above conflicted with the express terms of the SPA and JVA.

[63] On the contrary, it was submitted for the plaintiff that the SPA and the JVA are to be read together. We are unable to accept the submission of the defendants in respect of this issue.

[64] At this juncture, we remind ourselves that it is not sufficient for us to conclude that had it been conducting the trial, we would have come to a different conclusion from that which the trial judge came. In the case of *MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd* [2016] 2 MLJ 428; [2016] 4 CLJ 665, Nallini Pathmanathan JCA (as she then was) explained why it was important that a court sitting on appeal should only set aside a finding of fact or conclusion reached by the court below in limited circumstances. At para 5, Her Ladyship quotes the famous dicta of Lord Thankerton in *Thomas v Thomas* [1947] AC 484 at this point:

> (1) Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate Court which is disposed to come to a different conclusion on the printed evidence, *should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge 's conclusion*. (2) The appellate Court may take the view that, without having seen or heard the witnesses, it is not in the position to come to any satisfactory conclusion on the printed evidence. (3) The appellate Court, may either because the reasons given by the trial judge are not satisfactorily, or because it unmistakably so appears from the evidence, *may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses and the matter will then become at large for the appellate Court*. [emphasis added]
>
> It was the view of the Court of Appeal that it would only be in the 'rarest of occasions and where the appellate Court is convinced by the plainest of

considerations that it would be justified in finding that the trial judge had come to an erroneous conclusion on the evidence before him.' The Court of Appeal also subscribed to the view expressed in *Anderson v City of Bessemer* (1985) 470 US 564, 574–575 by the US Supreme Court where it inter alia concluded that '... review of factual findings under the clearly erroneous standard — with its deference to the trier of fact — is the rule, not the exception'.

In the same decision, Her Ladyship further examined the term 'plainly wrong' and explained that:

> [14] The requirement for the trial judge to have come to a finding which was '*plainly wrong*' before an appellate court may intervene is therefore well entrenched in our appellate philosophy and practice. In *Henderson v Foxworth Investments Ltd and another (above)* Lord Reed considered the meaning to be accorded to the phrase 'plainly wrong':
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> > ... there may be some value in considering the meaning of that phrase. There is a risk that it may be misunderstood. *The adverb 'plainly' does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.*
>
> [15] This is a point of some importance because it underscores the rationale that the appellate court is not at liberty to reverse or interfere in the finding of a trial judge even if the appellate court is clearly of the view that it would not have reached the conclusion the trial judge did on the evidence on record before it. It requires something more. The requisite or correct standard to be applied is that no reasonable judge, on the evidence on record, could have reached the conclusion of the trial judge. In other words, so long as the findings of the trial judge are plausible on the evidence on record, there is no room for interference merely on the grounds that the appellate court forms a different opinion on the same evidence.
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> [16] There is, however, little room for variation in the application of the principle of intervention when the trial judge is 'plainly wrong'. Appellate court ought to be consistent in ensuring that appellate intervention only comes about when a trial judge reaches a conclusion which no reasonable judge could have reached. A lack of such consistency in approach would give rise to considerable uncertainty in the practice and progress of litigation. Litigants through their counsel should be able to assess with some degree of certainty, on clear and distinctly applied principles of law, whether a judgment obtained at first instance is likely to be overturned or not. This is only possible if there is a consistent application of the 'plainly wrong' principle underlying an appellate intervention.
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> [17] The obverse or counterpart to the requirement for appellate restraint in dealing with findings of fact by the trial judge is the fundamental requirement that the judgment of the first instance does in fact amount to a comprehensive and cohesive determination of the material matters comprising the subject matter of dispute before the trial judge. This requires the trial judge to undertake a full evaluation of the evidence and issues placed before the court. A first instance judgment is open to challenge when it fails to address or wholly ignores material evidence or issues

placed before it, or when bald findings of fact are made with no reasoning or evidence to substantiate such findings. Equally errors of law, a clear misunderstanding of relevant evidence and such clearly identifiable errors will all contribute towards a decision that would be considered to be 'plainly wrong'.

[30] This limited, rare and restrained exercise of intervention is substantially due to the fact that these two tiers of the judicial system, the trial Court and the appellate Court, have different primary functions. If the appellate Court was to require parties to go through the whole process of persuading the appellate panel the very questions of fact that were determined in the trial Court, it would 'expose parties to great costs and divert judicial resources for what would often be negligible benefit in terms of factual accuracy' not to mention that the perception of the appellate Court may be somewhat 'narrowed or even distorted by the focused challenge to particular parts of the evidence' — see *Carlyle v Royal Bank of Scotland Plc* [2015] UKSC 13. When considering whether to intervene, the appellate Court must be convinced that the error committed by the trial Court is material, or that there is a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence in which case the decision cannot reasonably be explained or justified, as expressed by the UK Supreme Court in *Henderson v Foxworth Investments Limited and Another* [2014] UKSC 41. In other words, the Court of Appeal must be satisfied that the findings or conclusions literally fly in the face of incontrovertible facts or undisputed evidence leaving the decision arrived at as highly improbable or contrary to reasonable inferences which may be drawn from such evidence.

Consequently, it is paramount and crucial that we remind ourselves that, as the appellate Court, we do not intervene on findings of fact as that is the primary function of the trial judge who is best placed and equipped to assess that decision. The trial judge would have had an opportunity to evaluate the demeanour of the witness in order to draw some conclusions on the credibility of that witness. However, that evaluation of issues, claims, defences as well as counterclaims, must be conducted properly, holistically and not compartmentalised, looking at all the circumstances and in accordance with the applicable legal principles and the law of evidence. There must also be consistency in conclusions reached. Where that evaluation is not full or adequate and where it has not been considered or tested against the weight of all other evidence properly placed before the Court, particularly contemporaneous documentary evidence, such finding can no longer be said to be safe or one which a reasonable judge could have reached. In such a situation where the trial Court is plainly wrong in its apprehension of the law and the facts, where there has been no or insufficient judicial appreciation of the evidence, or where the acceptance or rejection of the evidence is not founded on good reasons, the appellate Court must intervene when a miscarriage of justice is occasioned.

[65] Whether or not the two agreements are distinct and severable are to be construed by the courts having regards to the terms of the two agreements read together (see Federal Court case: *Peninsular Land Development Sdn Bhd v K Ahmad* [1970] 1 MLJ 149) (the manner in which the learned High Court

judge approached the problem was to regard the SPA and the JV agreement as not distinct and severable).

[66] In this present case, the trial judge accepted the plaintiff's oral evidence about the first defendant's offer to the original proprietors and to him. In outline, the evidence was that the defendants offered to buy over the said land for RM500,000 and the additional of RM2.5m to be paid from the development profit pursuant to a joint venture and to set off the RM2.5m with units of apartment of equivalent value. The second and third defendants also offered to give a personal guarantee to that effect. As a result from the discussion between parties, the land owners agreed to the offer and gave the plaintiff a full mandate to execute the joint venture project to buy over the land for RM500,000 and the additional RM2.5m to be paid from the development profit pursuant to a joint venture and/or set off the RM2.5m with units of apartments of equivalent value.

[67] We find that the findings of the learned trial judge is probable and not contrary to compelling inferences.

[68] It is our view that the SPA and the JVA are clearly and objectively intended to be read as co-existing together. This is demonstrated in the following:

(a) the dates of the agreements are executed on the same day, that is on 21 October 1993;

(b) aa copy of SPA was annexed to the JVA and marked 'M1' (see recital (2) of the JVA); and

(c) recital 1 of the JVA made reference that the plaintiff shall at the request and on behalf of the first defendant secure the sale of the said land.

[69] We agreed with learned counsel for the plaintiff that the denial of the defendants are rebutted through the documentary evidence where all the sale and purchase, joint venture agreement and letter of guarantee were dated on the same date and the continuity of the understanding was stated by the deceased original proprietor and also is self-evident from the statutory declarations filed by the original proprietors together with Form 19B. In the present case, what the original owners were supposed to agree with the defendant is consistent with the statutory declaration filed by Rahmah.

[70] The learned counsel had a further argument based upon the parole evidence rule pursuant to s 92 of the Evidence Act. Learned counsel for the defendant also submitted that the learned judge has erred in law in accepting

the oral evidence of the plaintiff which contradicts the terms of the two written agreements which is contrary to s 92 of the Evidence Act.

[71] In our view, the oral evidence preferred was not in any way put forth with a view to contradict to the terms of the written agreement between the plaintiff and the first defendant but its introduction was purely for the purpose to establish the existence of an independence oral contract between the original proprietors and the first defendant over the sale of the said land to the first defendant.

[72] The High Court's factual findings on the existence of the oral agreement between the plaintiff and the first defendant lead to the conclusion that the purchase price of the said land is RM2.5m. The alleged oral agreement has been accepted by the learned High Court judge who had the benefit of seeing the demeanour of the witnesses. We find no reasons to disturb the finding of the existence of an oral agreement by the learned judge (see *Gan Yook Chin v Lee Ing Chin*; *UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] supp MLJ 363; [2010] 9 CLJ 785; *Lee Chee Keong v Fadason Holdings Sdn Bhd and other appeals* [2017] 3 MLJ 728; *Lin Wen-chih & Anor v Mycom Bhd* [2014] 3 MLJ 691).

[73] As we have said earlier based on paras 2.1 and 2.4 of Form 19B, the plaintiff was properly clothed to deal with the said land. Therefore, the plaintiff is competent to enter into the JVA for the development of the land with the first defendant subject to the terms and conditions in the said JVA. The JVA contained certain terms and conditions that would require the parties to do certain things.

[74] The evidence clearly shows that the first defendant at all material time after the execution of the joint venture agreement is capable and not prevented by any reason of law to submit the layout plan but yet have failed, refused and/or neglected to do so.

[75] Clauses 1.1 and 1.2 of the condition precedent to the JVA mandated the plaintiff to secure DBKL's approval of the development project, at his own cost and expense. The required approval must be secured by the plaintiff within six months of the first defendant's submission of the project's layout plans to DBKL. The first defendant, in return, shall be responsible for all approvals and requisite contribution in respect of the application for the approval order.

[76] The leading Malaysian authority regarding the fulfillment of conditions in a contract is the decision of Lord Jenkins in *Aberfoyle Plantations Ltd v Khaw Bian Cheng* [1960] 1 MLJ 47 where it was held by the Privy Council that parties must fulfill the conditions stipulated in the agreement. It was thus made

plain beyond argument that the fulfillment of a condition precedent in a contract of sale is binding upon parties. See also *Waman Shriniwas Kini v Ratilal Bhagwandas & Co* 1959 AIR 689 and *Dhanukdhari Singh & Anor v Nathima Sahu & Ors* (1907) 11 Cal WN 848.

[77] Factually also, from the terms of the JVA, it is without a doubt that it was the intention of the parties that the first defendant shall fulfill its fundamental obligation under the JVA which was to submit the layouts plans to DBKL. This was the condition precedent in the contract that must be fulfilled (see *Chase Perdana Bhd v Md Afendi bin Hamdan* [2009] 6 MLJ 783; [2009] 6 CLJ 501).

[78] The reason given by the appellant for non-submission is that there are squatters on the land and there is no access road to the land. This was never pleaded in their defence and was only raised for the first time during the trial.

[79] Further, it is admitted during the cross-examination that DW1 could still submit the layout plan.

[80] Therefore, we find that the learned High Court judge is not plainly wrong when she decided that the purchase price of the said land was RM3m, leaving the balance RM2.5m unpaid by the first defendant to the plaintiff and the original proprietors in failing to pay the respondent the balance purchase price and willful concealment from the plaintiff the receipt of RM1,594,984.32 as compensation payment pursuant to the Government's acquisition of a portion of the said land.

[81] We accept the defendants had committed fraud with intent to deceive and/or induce the plaintiff to enter into the agreement without intention to fulfill the promise into the joint venture agreement and merely made the said promise to induce the respondent into the joint venture agreement and for the original proprietors to enter into the said sale and purchase agreement (see *Public Bank Bhd lwn Rafidah bt Zainal Abidin* [2016] 9 MLJ 33).

[82] We agreed with learned counsel for the plaintiff that the denial of the defendants are rebutted through the documentary evidence where all the sale and purchase, joint venture agreement and letter of guarantee were dated on the same and the continuity of the understanding was stated by the deceased original proprietor and also is self-evident from the statutory declarations filed by the original proprietors together with Form 19B.

[83] Section 19 of the Contracts Act 1950 stipulates that when consent to an agreement is caused by coercion, fraud or misrepresentation that agreement is a contract voidable at the option of the party whose consent by fraud and

misrepresentation, may if he thinks fit, insist that the contract shall be performed and that he shall be put in the position in which he would have been if the representation made had been true. The innocent party has the right whether to rescind or affirm the contract (see: *Balakrishnan a/l Devaraj & Anor v Admiral Cove Development Sdn Bhd* [2010] MLJU 576; [2010] 7 CLJ 152 (COA)).

[84] In the case of *Abdul Razak b Datuk Abu Samah v Shah Alam Properties Sdn Bhd* [1999] MLJU 144; [1999] 3 CLJ 231 this court held that a representee who is the victim of fraud may, at his election, abandon his right to rescind and may instead insist that the contract be performed and that he be put in the position in which he would have been if the representation made had been true.

[85] The plaintiff submitted that the defendant being the innocent party to the fraud and misrepresentation is entitled to proceed with the agreement and claim the remaining balance sum of RM2,146,000 as allowed by the trial judge.

[86] As the law is clear that although there is fraud pursuant to s 17 of the Contracts Act 1950, the plaintiff can insist on the agreement pursuant to s 19(2) of the Contracts Act 1950 and the part performance is still sustainable.

[87] The defendants have also defrauded the plaintiff and the original proprietors in failing to pay the plaintiff the balance purchase price and willful concealment from the plaintiff receipt of RM1,594,984.32 as compensation payment pursuant to the government's acquisition of a portion of the said land.

[88] Pursuant to s 74 of the Contracts Act 1950 as in this case, the plaintiff being the injured party in the JVA and letter of guarantee dated 21 October 1993 which the first defendant failed to proceed with the agreement to submit the layout plan. As such, the plaintiff as a person injured by the failure to discharge it is entitled to receive the compensation of the balance sum of RM2,146,000 from RM2.5m.

[89] We are of the opinion that the learned High Court judge was correct, in making the following findings:

(i) cll 1.1 and 1.2 of the condition precedent to the JVA mandated plaintiff to secure DBKL's approval of the development project, at his own cost and expense. The required approval must be secured by the plaintiff within six months of first defendant's submission of the project's layout

plans to DBKL. The first defendant in return shall be responsible for all approvals and requisite contribution in respect of the application for the approval order;

(ii) based on the explicit terms of the condition precedent, it was evident that the parties' joint venture project did not materialise due to the first defendant's failure to submit the required layout plans for the project to the DBKL for the latter's approval. The first defendant failed to fulfill its fundamental obligation under the JVA which was to submit the layouts plans to DBKL. Consequent to the defendant's fulfillment of their obligations, the plaintiff was required to use his best endeavor to secure DBKL's approval for the project;

(iii) it is further evident to this court that there was no impediment to the fulfilment of the defendant's obligation and the defendants were not prevented by any reason, from fulfilling its obligation to prepare and submit the layout plan for the project. The defendants merely attributed their failure to the presence of squatters on the land which prevented access to the said land; and

(iv) in simultaneously executing the three documents, the SPA, JVA and letter of guarantee, it is evident that defendants jointly have intended to deceive plaintiff and, the landowners with the purchase of the land at a mere payment of RM500,000 as deposit.

[90] Even if the new purchaser were bona fide purchasers they could not by that fact alone have acquired a shield of indefeasibility unless they have been bona fide subsequent purchases (see *Low Huat Cheng & Anor v Rozdenil bin Toni and another appeal* [2016] 5 MLJ 141). In this case, the new purchaser is not a subsequent purchaser and therefore is not 'a purchaser' under then provision of s 340 of the NLC.

Limitation

[91] The next issue that arises is whether the plaintiff's action is in breach of s 6 of the Limitation Act 1953. On this issue, the first defendant submitted that the learned High Court judge completely omitted to deal with

the issue of the defence of limitation. It was submitted that this was a fundamental error in judicial adjudication since the plaintiff has plead defence of limitation under s 6(1) of the Limitation Act 1953 and therefore it warrants appellate intervention.

[92] Learned counsel for the defendant submitted in this appeal that as the plaintiff's action was only instituted on 12 February 2016 ie more than 18 years after the notices were served, the reliefs sought by the plaintiff, if he so entitled, are time-barred as time runs from the date of the breach of the JVA: s 6(1)(a) of the Limitation Act 1953. In support of the defendant's submission learned counsel referred us to the case of *Insun Development Sdn Bhd v Azali bin Bakar* [1996] 2 MLJ 188 where the Supreme Court held as follows:

> It is clear law that in the absence of express contractual provision, the purchaser's right to sue for damages would accrue on the date of the breach of contract (see *Nasri v Mesah* [1971] 1 MLJ 32 at p 34; *Reeves v Butcher* [1891] 2 QB 509 at p 511; *Gibbs v Guild* (1881–1882) 8 QBD 296 at p 302).
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> But, the parties to a contract are free to regulate or modify their rights in the event of breach thereof in such a manner as to postpone the date of accrual of their right to sue for damages which, of course, was what had happened in *Loh Wai Lian*.
>
> ...
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> It follows, therefore, that our answer to the crucial question aforesaid is: because the agreement by cl 18(2) had provided for a formula for the calculation of liquidated damages which defined the terminus a quo(the opening date) but not the terminus ad quem(the closing date), the purchaser's right of action for damages for breach of contract — following the general rule — accrued on the date of the breach which, in this case, was the day after the time limited under cl 18(2) for the delivery of vacant possession, that is to say, on 12 December 1986. Accordingly, the purchaser, having commenced proceedings only on 31 July 1993, was more than seven months out of time. We are thus driven to the inevitable conclusion that the purchaser's claim was statute-barred under the provisions of s 6(1) of the Limitation Act 1953.

[93] On the other hand, learned counsel for the plaintiff contended that the time ought not to be barred under s 6(1) of the Limitation Act 1953 as the defendant's numerous fraudulent conducts have rendered the action to be postponed to date of discovery as at 19 March 2013.

[94] In support of its submissions, the learned counsel relied on the following authorities *Lim Yoke Kong v Sivapiran a/l Sabapathy* [1992] 2 MLJ 571 and *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409.

[95] We have carefully read the judgment and it is clear that the learned High Court judge failed to consider the issue of limitation in her judgment eventhough the defendant has raised in its written submission and it was also an agreed issue to be tried between the parties. It is the expectation of all parties in litigation that the court would focus on the pleaded issues. In *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196, Sharma J held:

> It should be realised that the defendant never raised any plea that the plaintiff had not complied with any of the provisions of the Moneylenders Ordinance. No such issue arose on the pleadings. A statement of claim and the defence (together with the

reply, if any) constitute the pleadings in a civil action. It is on the examination of the pleadings that the court notices the differences which exist between the contentions of the parties to the action. In other words the matters on which the parties are at issue are determinable by an examination of the pleadings. An issue arises when a material proposition of law or fact is affirmed by one party and denied by the other. The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance. If the parties agree to a factual position then it is hardly open to the court to come to a finding different from such agreed facts. The only purpose in requiring pleadings and issues is to ascertain the real difference between the parties and to narrow the area of conflict and to see just where the two sides differ.

It was not open to the learned magistrate to fly off at a tanget as it were and disregard the pleadings in order to reach a conclusion that he might have thought was just and proper. It was held by Scrutton LJ in the case of *Blay v Pollard & Morris* [1930] 1 KB 628 at p 634:

> Cases must be decided on the issues on record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleadings and in my opinion he was not entitled to take such a course.

This case was followed in our own Court of Appeal in *Haji Mohamed Dom v Sakiman* [1956] MLJ 45 where Sir Charles Mathew CJ said:

> I think it is clear that a Judge is bound to decide a case on the issues on the record and that if there are other questions they must be placed on the record.

A judgment should be based upon the issues which arise in the suit and if such a judgment does not dispose of the questions as presented by the parties it renders itself liable not only to grave criticism but also to a miscarriage of justice. It becomes worse and is unsustainable if it goes outside the issues. Such a judgment cannot be said to be in accordance with the law and the rules of procedure. It is the duty of the courts to follow the rules of procedure and practice to ensure that justice is done. These rules are meant to be observed and respected. The faith and the confidence of the public in the law, the Constitution and the Government depends to a fairly large extent on the way the machinery of justice functions and it is the duty of those who man that machinery to realise that what they do does not in any way tend to diminish that faith. Everyone is, no doubt, liable to make mistakes but it would have been better if the learned magistrate had acted in less haste and had taken a little time to look up the law on the matter.

[96] The above principle has been followed in numerous cases (see: *YB Engineering Sdn Bhd v Standard Sofa Industries Sdn Bhd* [2018] MLJU 1843; *Majlis Bandaraya Pulau Pinang v Mohd Noor Sirajajudeen & Anor* [2018] 5

MLJ 349; *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428; *Gerard Jude Timothy Pereira v Kasi a/l KL Palaniappan* [2017] 6 MLJ 54)

[97] Reverting to the facts of the present case, it is not disputed that the plaintiff issued notices of demand to the first defendant and the guarantor on 31 March 1997 and 30 April 1997 respectively, taking the position that the JVA was breached and demanding the balance contractual sums under the same.

[98] Section 6(1) of the Limitation Act 1953 provides that an action founded on contract or tort must be brought within six years from the date on which the cause of action accrued. The key question that merits consideration under this issue is whether the plaintiff's action is time-barred under s 6(1) of the Limitation Act 1953 as pleaded and contended by the defendant. In view of our finding that the defendant is guilty of fraud, therefore s 6(1) of the Limitation Act 1953 become inapplicable.

[99] The issue of fraud as submitted by the plaintiff is an important issue in bringing into play the application of limitation period under s 22 of the Limitation Act 1953. The issue of fraud was clearly pleaded by the plaintiff in its pleading.

[100] Therefore, eventhough the learned High Court judge did not address the issue of limitation, s 6(1) has no application in this case. We are of the view that there is no non-direction by the learned trial judge. The failure of the trial court to address the issue of limitation under s 6(1) would not amount to a misdirection, which would require appellate intervention (see *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; *OSK & Partners Sdn Bhd & Anor v Assets Investment Pte Ltd & Anor* [2008] 4 MLJ 914; *Aseambankers Malaysia Bhd & Ors v Shencourt Sdn Bhd & Anor* [2014] 4 MLJ 619).

The JV agreement is illegal

[101] Relying on recital (3) of the JV agreement, the defendant submitted that the JV agreement is illegal and unenforceable. The essence of the plaintiff submission is as follows:

(a) the plaintiff carried out estate agent practice in breach of s 21(1)(aa) or (c) or s 22(1)(aa), (ba), (c) or (d) of the Value, Appraisers and Estate Agents Act 1981;

(b) the plaintiff is not registered as a valuer of an estate agent; and

(c) the plaintiff undertaking in the JVA is in clear violation of ss 21(1)(aa) or (c) or (d) of the Value, Appraisers and Estate Agents Act 1981.

[102] Learned counsel for the plaintiff argued that the defendants have failed to plead the issue of illegality in their defence and also during the trial stage. As such, the appellant by raising the issue of illegality at the appeal stage must not be taken into account as the respondent shall not be caught by surprise.

[103] It is observed that the agreed issues to be tried before the learned High Court judge did not concern the defendant's allegation of illegality. We observed that the issue of illegality was raised by the defendant for the first time in its written submission before the High Court. We have perused the notes of proceedings and we found that the issue of illegality was also not raised by learned counsel for the defendant during trial.

[104] Hence in our view, the learned High Court judge is correct in not deciding on the issue of illegality. In fact, the issue relates to illegality is not in their pleadings. We have perused the entire defences filed by the defendant, we find the issue of illegality was not pleaded by the defendant. Therefore, we are of the opinion that there is no error by the learned judge in not addressing this issue.

[105] The Federal Court in *Dato' Hamzah bin Abdul Majid v Omega Securities Sdn Bhd* [2015] 6 MLJ 725; [2015] 6 MLRA 677, the Federal Court ruled that any radical departure from the pleaded case which is not just a variation, modification or development of what has been alleged in the pleading in question, must be specifically pleaded. Any unpleaded matter ought to be disregarded by the court. In the present appeals, it is our finding that the issues relating to illegality as raised by the defendant clearly amounted to radical departure from the pleaded case of the defendant as appeared in its defence and therefore ought not to be allowed.

[106] However, in case we were wrong, we shall nevertheless deal with this issue. We believe the case of *Asia Television Ltd & Anor v Viwa Video Sdn Bhd & connected cases* [1984] 2 MLJ 304 is sufficient to answer the question now before us. In this case, the plaintiffs claimed copyright in certain films and alleged that the defendants had infringed the same. Accordingly, the plaintiffs obtained ex parte Anton Pillar orders from the High Court. The defendants applied to set aside the Anton Pillar orders and the learned judge agreed with the argument by the defendants that the publication of the films was illegal as no certificates of approval were obtained as required under the Films (Censorship) Act 2002.

[107] The matter went on appeal to the Federal Court, where it held that before any question of illegality arose, there must be a nexus between the statutory requirement and the cause. The Federal Court held that non-compliance with the Films (Censorship) Act 2000 did not also result in

defeating the plaintiff's rights under the Copyright Act 1987 as there was no nexus between the two. Delivering the judgment of the Federal Court, Abdoolkader FJ held:

> The issue then is the effect of non-compliance with the provisions of the Films (Censorship) Act on the question of acquisition of copyright under the Copyright Act and whether this is accordingly precluded as a result. It would appear from the contention of the respondents and the judgment of the learned Judge who held that the publication by the appellants was unlawful that any such non-compliance inhibited the operation of section 6(1)(a) of the Copyright Act with the result that the appellants could not and did not acquire any copyright in the films in question. The correlation between the two legislative enactments must in our view depend on whether there is a nexus between them. Mr Davidson agrees in answer to a question we put to him that such a nexus is a necessary prerequisite and that the burden is on the respondents to establish this as between the two Acts. In *Curragh Investments Ltd v Cook* it was held that for a contract to be illegal as being made in contravention of some statutory provision there had to be a sufficient nexus between the statutory requirement and the contract, and that where statutory requirements were not linked sufficiently, or at all, to the contract no question of its illegality arose.

The JV is opposed to public policy

[108] The final question is whether the JV agreement was opposed to public policy.

[109] Learned counsel for the defendant submitted that the JV agreement is unlawful as it opposed to public policy pursuant to s 24(e) of the Contracts Act 1950.

[110] Clause A and B of the JVA provides as follows:

> (A) 1. Condition Precedent
>
> 1.1 The first party at his own costs and expenses must secure the approval from Dewan Bandaraya Kuala Lumpur (DBKL) of a Development order for the said Property for construction of a minimum of 500 units of standard medium costs apartment, each counting of an approximately area of 900 square feet or less and at a purchase price of RM70,000.00 or more per unit.
>
> 1.2 The first party at his own costs and expenses must use his endeavours to secure the said approval from DBKL within a period of six (6) months from the date of submission of a layout plan of the said Property to DBKL by the second party. It is hereby agreed that the second party shall be responsible to all approved and requisite contribution/s for the above application/s.
>
> ...
>
> (B) 2. Sale of the Approved Units

2.1 The first party shall make all efforts to secure the block purchase of all the approved units from the Police Force and/or the Armed Forces of Malaysia within six (6) months from the date of the submission of the layout plan to DBKL by the second party.

2.2 In the event of any delay arising from the securing of the block purchase, the second party shall be entitled at their sole discretion to extend and/or terminate this Agreement by giving the first party one month's notice in writing and at the end of the notice period, this Agreement shall be terminated.

[111] In support of his submission, learned counsel for the defendant relied on the case of *John Ambrose v Peter Anthony & Anor* [2017] 4 MLJ 374 at para [41] where it was held:

[41] In our view, the most pertinent principle encapsulated in Merong Mahawangsa is that the courts are bound at all stages to take notice of illegality, whether ex facie or which later appears, even though not pleaded, and *that it was contrary to public policy that a person should be hired for money or valuable consideration, to use his position and interest to procure a benefit from the government*. (Emphasis added.)

[112] The plaintiff submitted that recital (1) and (2) of the JV agreement was clearly a valid and legal agreement between the parties.

[113] It is noted that cll (1) and (2) of the JV agreement requires the plaintiff to make the block purchase of all the approved units from the Police Force and/or the Armed Forces of Malaysia within six months from the date of the submission of the layout plan to DBKL by the first defendant. In the event of any delay arising from the securing of the block purchase, the first defendant shall be entitled at their sole discretion to extend and/or terminate this Agreement by giving the plaintiff one month's notice in writing and at the end of the notice period, this Agreement shall be terminated.

[114] It must be noted that cl (1) and (2) of the JV agreement did not state anything which was illegal on its face, more importantly, the defendant has failed to prove a shred of evidence that the plaintiff was involved with any illegal conduct.

CONCLUSION

[115] In our view, we agreed with the learned trial judge for reasons given above that the first defendant did not obtain an indefeasible title upon the registration of the transfer to him by the original owners. The first defendant became the registered owner of the said land as a result of fraud and therefore this case falls under the exceptions under sub-s 340(2) of the NLC.

[116] Pursuant to the relief claimed by the plaintiff under para 49 of the statement of claim, it would mean that an order should be made that the memorandum of transfer and the entry in the register book relates to it should be cancelled and that the grant of title should be amended.

[117] For the reasons stated in our judgment, we dismissed the appeal, and confirmed the order of the learned High Court order. Accordingly, we ordered cost of RM20,000 to the respondent for both appeals subject to payment of allocator.

Appeal dismissed; High Court's decision affirmed.

Reported by Ashok Kumar